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No. 88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GARY E. PEEL,

v.

Petitioner,

ATTORNEY REGISTRATION AND DISCIPLINARY
COMMISSION OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
THE AMERICAN BOARD OF PROFESSIONAL
LIABILITY ATTORNEYS
THE INTERNATIONAL ACADEMY OF
TRIAL LAWYERS
THE NATIONAL ASSOCIATION OF WOMEN LAWYERS
THE NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
IN SUPPORT OF PETITION FOR CERTIORARI**

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Pursuant to Rule 42 of the Rules of this Court, applicants respectfully move this Court for leave to file the accompanying brief as amicus curiae in support of the Petition for Writ of Certiorari in this case.

This motion is necessitated by the refusal of counsel for Respondent to consent to the filing of this brief.

Applicants are voluntary national associations of practicing attorneys whose goals include the advancement of justice by fostering the availability of legal representation to those in need of legal services. A key to this goal is the consumer's access to information that will enable him or her to make an informed decision concerning legal representation,

Individual applicants are identified in greater detail in the accompanying brief in support of the Petition for Certiorari. Of greatest significance to this Court's decision on this motion is the fact that applicants are sponsors of the National Board of Trial Advocacy, whose certification of trial specialists is at the heart of this case.

As the sponsors of NBTA, applicants have a substantial stake in this Court's resolution of this case. Moreover, applicants believe that their brief in this case will be of assistance to this Court. Applicants expect to address issues that are not likely to be fully explored by the parties themselves. Of particular concern to applicants is the fundamental premise of NBTA that the public is best served by certification of trial specialists under a national program, applying national standards, and providing this information to the public in a uniform, consistent manner in all states.

For these reasons, applicants respectfully move the Court for leave to file the accompanying brief in this case as amicus curiae.

Respectfully submitted,

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QUESTION PRESENTED

Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court, in direct and acknowledged conflict with two other State supreme courts, to impose public censure on an attorney for stating on his letterhead the truthful and readily verifiable fact that he had been certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy?

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INTERESTS OF AMICI—

Amici are independent voluntary bar associations who are sponsors of the National Board of Trial Advocacy ["NBTA"].

The Association of Trial Lawyers of America is an association of over 60,000 attorneys who are engaged primarily in representing the victims of tortious misconduct. ATLA's sponsorship of NBTA springs from a conviction that competent trial advocacy demands a degree of knowledge, skill, and experience beyond that required for admission to the bar generally. Moreover, those in need of legal services require objective information regarding an attorney's knowledge, skill, and experience in trial advocacy in order to make an informed choice concerning legal representation.

The American Board of Professional Liability Attorneys is a highly selective national organization of approximately 350 trial attorney specialists with expertise and experience in professional negligence and product liability litigation.

The International Academy of Trial Lawyers, established in 1954, has a membership of 500 U.S. Fellows who are specialists in trial practice, representing claimants or defendants.

The National Association of Criminal Defense Lawyers consists of 5,000 members and is the only national bar organization working on behalf of public and private criminal defense attorneys.

The National Association of Women Lawyers, founded in 1899, includes in its membership private practitioners, prosecutors, public defenders, trial and appellate judges, law professors and law students.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BY THE ILLINOIS SUPREME COURT THAT THE FIRST AMENDMENT DOES NOT FORBID A BLANKET PROHIBITION AGAINST ATTORNEY ADVERTISING OF THE TRUTHFUL FACT OF NBTA CERTIFICATION AS A TRIAL SPECIALIST IS IN CONFLICT WITH TWO OTHER STATE SUPREME COURTS.

In 1977, this Court laid to rest the "paternalistic" notion that "the public is better kept in ignorance than trusted with correct but incomplete information." *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977). Moreover, "it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Id.* at 375.

That same year, the National Board of Trial Advocacy was established to furnish the public with the information necessary to make an informed choice of legal representation in matters requiring trial advocacy. Its program followed the medical profession's example of board certification of specialists. The NBTA program is based on the premises that the public is best served by (1) rigorous and objective standards as to education, experience, and expertise in trial advocacy, (2) application of these criteria on a uniform, national basis, and (3) disclosure to the public of NBTA certification of the fact an attorney has met these standards. [For further detail concerning the operation of the NBTA program and its standards for certification, Amici respectfully refer the Court to the Brief of NBTA as amicus curiae in support of the Petition.]

Attorney statements to the public regarding NBTA certification as a trial specialist admittedly come into conflict with the state versions of Code of Professional Responsibility DR 2-105 still in effect in many jurisdictions. That rule imposes a blanket prohibition on attorney use of the terms

"certified" or "specialist", apart from historically recognized specialties, such as admiralty and patent law. Two state supreme courts have held that a state may not, consistent with the First Amendment, apply DR 2-105 to prohibit attorney statements disclosing certification by NBTA. *Johnson v. Director of Professional Responsibility*, 341 N.W.2d 282 (Minn. 1983); *Ex Parte Howell*, 487 So. 2d 848 (Ala. 1986). Both Courts relied upon findings that the statement of NBTA certification is not misleading or deceptive. 341 N.W.2d at 285; 487 So. 2d at 851. Both concluded that this Court's decision *In re R.M.J.*, 455 U.S. 191 (1982), prohibits a blanket prohibition of such statements. *Id.*

The decision by the Illinois Supreme Court in this case is the first instance in which a state supreme court has held that statements of NBTA certification are not protected by the First Amendment and may be prohibited under DR 2-105. 534 N.E.2d 980 (Ill. 1989). The Illinois Court's decision is based on its ruling that "certified" and "specialist" are misleading terms. The decision is thus in direct and irreconcilable conflict with the First Amendment decisions of the supreme courts of Alabama and Minnesota.

Supreme Court Rule 17.1(b) states that a consideration governing this Court's discretion to grant review is "When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." Amici submit that the Illinois Supreme Court's decision in this case warrants review by this Court.

II. THE ILLINOIS COURT'S DECISION THAT THE TERMS "CERTIFIED" AND "SPECIALIST" ARE MISLEADING FOR FIRST AMENDMENT PURPOSES IS A QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, AND IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Amici also suggest that this case raises both considerations identified in Supreme Court Rule 17.1(c):

When a state court . . . has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

A. THE ILLINOIS COURT'S APPROVAL OF A BLANKET PROHIBITION ON USE OF THE TERMS "CERTIFIED" AND "SPECIALIST" IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

It is difficult to see how use of the term "certified" could be misleading to the public in the manner asserted by the court below. 534 N.E.2d at 984. The court expressed concern that consumers would confuse "certified" with "licensed," a function within the sole authority of the court itself. The statement clearly indicates that certification was by the National Board of Trial Advocacy and the Illinois Court conducts no certification program that would raise the possibility of confusion. Additionally, the court asserted that the statement is misleading as a tacit claim as to the quality of legal services. *Id.*

It is clear that the court below did not establish that either "certified" or "specialist" is inherently misleading. The court was plainly concerned that members of the public might misinterpret either of those terms. Such concerns,

however, as this Court has repeatedly emphasized, do not justify blanket prohibitions on commercial speech.

[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may be presented in a way that is not deceptive.

In re R.M.J., 455 U.S. 191, 203 (1982).

Later, this Court stated:

Although our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services . . . they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641, n.9 (1985).

Amici suggest that the Illinois Court's application of the First Amendment in this case is in conflict with this Court's decisions relating to permissible limitations on attorneys' commercial speech. For that reason, amici urge this Court to grant review of this case.

B. THE FIRST AMENDMENT PROTECTION TO BE ACCORDED TRUTHFUL PUBLIC STATEMENTS REGARDING CERTIFICATION BY A BONA FIDE ORGANIZATION IS A MATTER WHICH SHOULD BE SETTLED BY THIS COURT.

The NBTA program is national in scope, reflecting not only the increasing mobility of our society, but also the trend toward national standards in law and in other professions. Koskoff, *Specialization Update*, 15 Trial 24 (1979). Experience indicates that the large start-up costs and relatively high operating expenses associated with meaningful certification programs make individual state programs infeasible for many states. Lumbard, *Specialty Certification for Lawyers: The National Alternative to the Non-Existent State Programs*, 1981 Women Lawyers J. 23.

Such a national program depends, however, upon consistent application of First Amendment principles. The decision by the Illinois Court that an attorney may be disciplined for using in his letterhead statements which other courts have held protected by the First Amendment endangers the operation of the program as nationally recognized standard that consumers can rely upon. Only a clear decision by this Court can avoid a "balkanization" of First Amendment values regarding professional qualifications.

CONCLUSION

For these reasons amici urge this Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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June 2, 1989